"in commerce" limitation on § 7's reach should be disregarded.

More importantly, whether or not Congress in enacting the Clayton Act in 1914 intended to exercise fully its power to regulate commerce, and whatever the understanding of the 63rd Congress may have been as to the extent of its Commerce Clause power, the fact is that when § 7 was re-enacted in 1950, the phrase "engaged in commerce" had long since become a term of art, indicating a limited assertion of federal jurisdiction. In *Schechter Corp.* v. *United States*, 295 U. S. 495, for example, the Court had drawn a sharp distinction between activities in the flow of interstate commerce and intrastate activities that affect interstate commerce. *Id.*, at 542–544. Similarly, the Court's opinion in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, two years later, had emphasized that congressional authority to regulate commerce was not limited to activities actually "in commerce," but extended as well to conduct that substantially affected interstate commerce. And the *Bunte Bros.* decision in 1941 had stressed the distinction between unfair methods of competition "in commerce" and those that "affected commerce," in limiting the scope of the Commission's authority under the "in commerce" language of § 5 of the Federal Trade Commission Act.

Congress, as well, in the years prior to 1950 had repeatedly acknowledged its recognition of the distinction between legislation limited to activities "in commerce," and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce. Section 10 (a) of the National Labor Relations Act, 49 Stat. 453, as amended, 29 U. S. C. § 160 (a), for example, empowered the National Labor Relations Board to prevent any person from engaging in an unfair labor practice "affecting commerce." Section 2 (7) of the Act, 49 Stat. 450, as amended, 29 U. S. C. § 152 (7), in turn,

defined "affecting commerce" to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce . . . ." Similarly, the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72, providing for the fixing of prices for bituminous coal, the proscription of unfair trade practices, and the establishment of marketing procedures, applied to sales and transactions "in or directly affecting interstate commerce in bituminous coal." 50 Stat. 76.

In marked contrast to the broad "affecting commerce" jurisdictional language utilized in those statutes, however, Congress retained the narrower "in commerce" formulation when it amended and re-enacted § 7 of the Clayton Act in 1950. The 1950 amendments were designed in large part to "plug the loophole" that existed in § 7 as initially enacted in 1914, by expanding its coverage to include acquisitions of assets, as well as acquisitions of stock. In addition, other language in § 7 was amended to make plain the full reach of the section's prohibitions. See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 311–323. Yet despite the sweeping changes made to effectuate those purposes, and despite decisions of this Court, such as *Bunte Bros.*, that had limited the reach of the phrase "in commerce" in similar regulatory legislation, Congress preserved the requirement that both the acquiring and the acquired companies be "engaged in commerce."

This congressional action cannot be disregarded, as the Government would have it, as simply a result of congressional inattention, for Congress was fully aware in enacting the 1950 amendments that both the original and the newly amended versions of § 7 were limited to corporations "engaged in commerce." See, *e. g.*, H. R. Rep. No. 1191, 81st Cong., 1st Sess., 5–6. Rather, the decision to re-enact § 7 with the same "in commerce" limitation can be rationally explained only in terms of a legislative intent, at least in 1950, not to apply the rather drastic

prohibitions of § 7 of the Clayton Act to the full range of corporations potentially subject to the commerce power.

Finally, the Government's contention that a limitation of the scope of § 7 to its plain meaning would undermine the section's remedial purpose is belied by the past enforcement policy of the Federal Trade Commission and the Department of Justice—the two governmental agencies charged with enforcing the section's prohibitions. Clayton Act §§ 11, 15, 15 U. S. C. §§ 21 (a), 25. The Federal Trade Commission has repeatedly held that § 7 applies only to an acquisition in which both the acquired and the acquiring companies are engaged directly in interstate commerce. *E. g., Foremost Dairies, Inc.*, 60 F. T. C. 944, 1068–1069; *Beatrice Foods Co.*, 67 F. T. C. 473, 730–731; *Mississippi River Fuel Corp.*, 75 F. T. C. 813, 918. And while the Government explains that it has never taken a formal position that § 7 does not apply to intrastate firms affecting interstate commerce, it does concede that previous § 7 cases brought by the Department of Justice have invariably involved firms clearly engaged in the flow of interstate commerce.[8] In light of

[8] Despite this concession, the Government somewhat inconsistently argues that the present case does not in fact involve a substantial departure from the previous § 7 enforcement pattern. In the past, the Government asserts, the United States has challenged acquisitions of "essentially local businesses that affected interstate commerce." *United States* v. *Von's Grocery Co.*, 384 U. S. 270, is cited as an example of such a challenge. But the District Court in that case expressly found that both of the merging grocery chains directly participated in the flow of interstate commerce because each purchased more than 51% of its supplies from outside of California. See 233 F. Supp. 976, 978. And in *United States* v. *County National Bank*, 339 F. Supp. 85, the only other case cited by the Government to support its contention that the case now before us does not involve a departure from previous enforcement policy, the sole question was quite different from that here in issue—whether

this consistent enforcement practice, it is difficult to credit the argument that § 7's remedial purpose would be frustrated by construing literally § 7's twice-enacted "in commerce" requirement.

In sum, neither the legislative history nor the remedial purpose of § 7 of the Clayton Act, as amended and reenacted in 1950, supports an expansion of the scope of § 7 beyond that defined by its express language. Accordingly, we hold that the phrase "engaged in commerce" as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power.

III

The Government alternatively argues that even if § 7 applies only to corporations engaged in the flow of interstate commerce, the Benton companies' activities at the time of the acquisition and merger placed them in that flow. To support this contention the Government relies primarily on the fact that the Benton companies performed a substantial portion of their janitorial services for enterprises which were themselves clearly engaged in selling products in interstate and international markets and in providing interstate communication facilities.[9] But simply supplying localized services to a corporation engaged in interstate commerce does not satisfy the "in commerce" requirement of § 7.

To be engaged "in commerce" within the meaning of § 7, a corporation must itself be directly engaged in the

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the "Bennington area" was a "section of the country" within the meaning of § 7 of the Clayton Act.

[9] The Benton companies derived 80 to 90% of their revenues from performance of janitorial service contracts for the Los Angeles facilities of interstate and international corporations such as Mobil Oil Corp., Rockwell International Corp., Teledyne, Inc., and Pacific Telephone & Telegraph Co.

production, distribution, or acquisition of goods or services in interstate commerce. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S., at 195. At the time of the acquisition and merger, however, the Benton companies were completely insulated from any direct participation in interstate markets or the interstate flow of goods or services. The firms' activities were limited to providing janitorial services within Southern California to corporations that made wholly independent pricing decisions concerning their own products. Consequently, whether or not their effect on interstate commerce was sufficiently substantial to come within the ambit of the constitutional power of Congress under the Commerce Clause, in providing janitorial services the Benton companies were not themselves "engaged in commerce" within the meaning of § 7. Cf. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S., at 227–235.[10]

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[10] The Government notes that this Court has held that maintenance workers servicing buildings in which goods are produced for interstate markets are covered by Fair Labor Standards Act provisions applicable to employees engaged in the production of goods for commerce. See, *e. g.*, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173. In *Kirschbaum* the Court reasoned: "Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity." 316 U. S., at 524. Similarly, the Government argues, in the present case Benton's janitorial services were so essential to the interstate operations of its customers that they too should be considered part of the flow of commerce.

The Fair Labor Standards Act, however, is not confined, as is § 7 of the Clayton Act, to activities that are actually "in commerce." At the time of the decisions relied upon by the Government, the Act provided that "an employee shall be deemed to have been engaged in the production of goods [for interstate commerce] if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in*

Similarly, although the Benton companies used janitorial equipment and supplies manufactured in large part outside of California, they did not purchase them directly from suppliers located in other States. Cf. *Foremost Dairies, Inc.*, 60 F. T. C., at 1068–1069. Rather, those products were purchased in intrastate transactions from local distributors. Once again, therefore, the Benton companies were separated from direct participation in interstate commerce by the pricing and other marketing decisions of independent intermediaries. By the time the Benton companies purchased their janitorial supplies, the flow of commerce had ceased. See *Schechter Corp.* v. *United States*, 295 U. S., at 542–543.[11]

In short, since the Benton companies did not participate directly in the sale, purchase, or distribution of goods or services in interstate commerce, they were not "engaged in commerce" within the meaning of § 7 of the Clayton Act.[12] The District Court, therefore, properly

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any process or occupation necessary to the production thereof . . . ." Fair Labor Standards Act of 1938, § 3 (j), 52 Stat. 1061, as amended, 29 U. S. C. § 203 (j) (emphasis added). Congress thus expressly intended to reach not only those employees who directly participated in the production of goods for interstate markets, but also those employees outside the flow of commerce but nonetheless necessary to it. Although Congress in 1950 could constitutionally have extended § 7 of the Clayton Act to reach comparable activity, it chose not to do so. See pp. 8–10, *supra*.

[11] The Government does not suggest that the purchase of janitorial equipment and supplies from local distributors placed the Benton companies in the flow of commerce, although it does argue that because of those purchases the firms had a substantial effect on interstate commerce—an issue not relevant in light of our construction of the reach of § 7 of the Clayton Act.

[12] The Government contends that the sale of janitorial services "necessarily" involves interstate communications, solicitations, and negotiations, and that such interstate activity should be viewed as part of the flow of interstate commerce. The merits of that argu-

concluded that the acquisition and merger in this case were not within the coverage of § 7 of the Clayton Act.

The judgment of the District Court is affirmed.

It is so ordered.

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ment need not be considered, however, since the record before the District Court does not support a finding that any of the Benton janitorial service contracts were obtained through interstate solicitation or negotiation.

SUPREME COURT OF THE UNITED STATES

No. 73-1689

United States, Appellant, *v.* American Building Maintenance Industries.	On Appeal from the United States District Court for the Central District of California.

[June 24, 1975]

MR. JUSTICE WHITE, concurring in the judgment.

I concur in the judgment and Parts I and II of the Court's opinion. I do not join Part III, for I doubt that the interposition of a California wholesaler or distributor between the Benton companies and out-of-state manufacturers of janitorial supplies necessarily requires that the Benton companies be found not to be "in commerce" merely because they buy *directly* from out-of-state suppliers only a negligible amount of their supplies. For the purposes of § 7 of the Clayton Act, a remedial statute, the regular movement of goods from out-of-state manufacturer to local wholesaler and then to retailer or institutional consumer is at least arguably sufficient to place the latter in the stream of commerce, particularly where it appears that when the complaint was filed, cf. *United States v. Penn-Olin Co.*, 378 U. S. 158, 168 (1964), the "local" distributor from which supplies were being purchased was a wholly owned subsidiary of the acquiring company, a national concern admittedly in commerce. In this case, however, the United States makes no such contention and appellee's motion for summary judgment was not opposed by the Government on that theory. It is therefore inappropriate to address the issue at this time; and on this record, I concur in the judgment that the Benton companies were not in commerce.

SUPREME COURT OF THE UNITED STATES

No. 73-1689

United States, Appellant, *v.* American Building Maintenance Industries.	On Appeal from the United States District Court for the Central District of California.

[June 24, 1975]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, dissenting.

For the reasons set forth in my dissenting opinion in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 204–207 (1974), decided earlier this Term, I cannot agree that the "in commerce" language of § 7 of the Clayton Act, 15 U. S. C. § 18, was intended to give that statute a narrower jurisdictional reach than the "affecting commerce" standard which we have read into the Sherman Act, 15 U. S. C. § 1 *et seq.* On the record in this case, it is beyond question that the activities of the acquired firms have a substantial effect on interstate commerce. I would therefore reverse the summary judgment granted below and remand for further proceedings in the District Court.

SUPREME COURT OF THE UNITED STATES

No. 73-1689

United States, Appellant, v. American Building Maintenance Industries. | On Appeal from the United States District Court for the Central District of California.

[June 24, 1975]

MR. JUSTICE BLACKMUN, dissenting.

I believe that the scope of the Clayton Act should be held to extend to acquisitions and sales having a substantial effect on interstate commerce. I therefore dissent. For me, the reach of § 7 of the Clayton Act, 15 U. S. C. § 18, is as broad as that of the Sherman Act, and should not be given the narrow construction we properly have given, just this Term, to the Robinson-Patman Act. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186 (1974).

For more than a quarter of a century the Court has held that the Sherman Act should be construed broadly to reach the full extent of the commerce power, and to proscribe those restraints that substantially affect interstate commerce. See, *e. g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 234 (1948); *United States* v. *Southeastern Underwriters Assn.*, 322 U. S. 533, 558 (1944). The Clayton Act was enacted to supplement the Sherman Act, and to "arrest in its incipiency" any restraint or substantial lessening of competition. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 589 (1957). To ascribe to Congress the intent to exercise less than its full commerce power in the Clayton Act, which has as its purpose the supplementation of the protections afforded by

the Sherman Act, is both highly anomalous and, it seems to me, unwarranted. Section 7 should not be limited, as the Court limits it today, to corporations engaged in interstate commerce, but should be held to include those intrastate activities substantially affecting interstate commerce.